

NTSB Order No. EA-4954

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of February, 2002

Respondent .

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respondent acted as second-in-command (SIC) entered into Class B airspace without an appropriate clearance from air traffic control (ATC), in violation of section 91.131(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.² As explained below, respondent's appeal is denied.

The key facts of the case remain largely undisputed. On December 2, 1999, respondent acted as the required SIC of a Hawker Siddley HS-125 jet on a flight under visual flight rules (VFR) that departed from the Spirit of St. Louis Airport (SUS) in St. Louis, Missouri, en route to Illinois Valley Regional Airport in Peru, Illinois. Respondent, as the non-flying pilot, was responsible for the communications with ATC. The crew had anticipated taking off under an instrument flight rules (IFR) flight plan, but the captain decided instead to proceed VFR to avoid delays. According to respondent, he was concerned about departing VFR because it was his first time operating out of SUS, but he was reassured, since the PIC said he was familiar with it. Tr. at 94-95. In preparation for the flight, respondent stated that he reviewed the government low altitude chart (IFR chart),³

²Section 91.131 states, in pertinent part:

Operations in Class B airspace.

(a) *Operating rules.* No person may operate an aircraft within a Class B airspace area except in compliance with § 91.129 and the following rules:

(1) The operator must receive an ATC clearance from the ATC facility having jurisdiction for that area before operating an aircraft in that area.

³He stated that he tried to buy a VFR chart but none was available. Tr. at 113.

from which he discerned that the aircraft would depart west, go out 5 to 10 miles in order to avoid the Class B airspace, and then turn to the north. Tr. at 96-98. A mile west of SUS, the Class B umbrella is 5,000 feet. Tr. at 30. Respondent advised local control that the aircraft would climb to 4,500 feet. Id.

Right after takeoff, respondent told the PIC that he "would just extend out a little bit." Tr. at 100. Soon thereafter, local control approved the aircraft for a right turn on course, and the PIC executed a turn while continuing to climb. Respondent testified that he did not know the aircraft had entered into Class B airspace until he contacted approach control, which then asked him his altitude. Tr. at 44, 104-05. He looked at the altimeter and realized that they were at 6,400 feet. Tr. at 104-05.

On appeal, respondent argues that the law judge erred in affirming the suspension order, since it was the PIC who bore the responsibility for the safe operation of the flight and that, as co-pilot, he was not required to "take any action contrary to the decision of the PIC." Respondent's brief at 8. His argument on this issue is flawed. Respondent was the required SIC on the flight. Therefore, although the PIC had the ultimate responsibility for the safe operation of the flight, respondent, as the non-flying SIC, still had duties to perform and shared the responsibility to pay attention. His early suggestion to the PIC to "extend out" was insufficient to fulfill that responsibility. Respondent's contention that he could have done nothing short of

"mutiny" to keep the aircraft from entering into Class B airspace is thoroughly unpersuasive. Reminding the PIC of the floor of the Class B airspace, letting him know that the aircraft was getting close, or even explaining why "extending out" was necessary are all simple things respondent could have done, as SIC. Respondent's choice to do nothing was incompatible with the highest degree of care demanded of a reasonable and prudent pilot. See, e.g., Administrator v. Frederick and Ferkin, NTSB Order No. EA-3600 at 6-7 (1992); Administrator v. Anderson, NTSB Order No. EA-3529 at 4-5 (1992).

Respondent also contends that he was deprived of a fair hearing. He alleges that, despite his attorney's request for the Administrator's witnesses to remain outside the hearing room prior to their time to testify, the witnesses nevertheless could hear the proceedings as they unfolded in the hearing room. This, he asserts, de facto entitles him to a new hearing.

To substantiate his contention, respondent offers an affidavit from Jack Montieth, the PIC on the subject flight. Mr. Montieth was called to stand by at the hearing as a potential rebuttal witness but never was called to testify. Respondent claims that Mr. Montieth could hear the proceedings over a loudspeaker in the lawyers' conference room as he waited and that, if he could hear them, presumably the Administrator's witnesses could hear them too.

The Administrator argues that Mr. Montieth's affidavit is not evidence and therefore the Board should not consider it.

Furthermore, she asserts, if the Board decides to consider Mr. Montieth's affidavit, it should also consider the affidavits of the three controllers wherein they state that none of them heard any of the hearing proceedings while waiting outside the hearing room to testify.

The issue of whether or not the Board should now consider the post-hearing affidavits is not one we must reach, as respondent makes neither a showing nor an argument to explain how he was harmed by this alleged error. He does not contest the controllers' descriptions of what occurred.⁴ Further, each of the three controllers testified to separate portions of the continuum of events that led up to and included the Hawker Siddley violating Class B airspace on December 2, 1999.⁵ Respondent makes no showing on appeal why a new hearing is necessary. As such, if any error occurred, it is harmless.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 30-day suspension of respondent's ATP certificate

⁴He did not challenge this at the hearing either.

⁵This consisted of the testimony of the ground controller, who sponsored the admission into evidence of the transcript of the ground control conversation; the local controller, who sponsored the admission into evidence of the transcript of the local control conversation; and the approach controller, who sponsored the admission into evidence of his conversation with respondent.

shall begin 30 days after the service date indicated on this opinion and order.⁶

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁶For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).